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Network Dynamics Cabling, Inc. and International Brotherhood of Electrical Workers Local Union 98, AFL-CIO. Cases 4-CA-27102, 4-CA-28171 and 4-CA-28213

April 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND MEISBURG

On September 17, 2001, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified below.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Network

¹ The Respondent has excepted to some of the judge's credibility findings, the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also contends that some of the judge's credibility findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the contention is without merit.

There are no exceptions to the judge's finding that the Respondent violated Section 8(a)(1) of the Act by telling an employee that applicants for employment could not be affiliated with the Union, or to the judge's finding that the Respondent violated Section (8)(a)(3) by suspending employee Anthony Angelucci, sending him home early from work, issuing him warnings and discharging him, all because of his activities on behalf of the Union.

² We will modify the judge's recommended Order in accordance with *Ferguson Electric Co.*, 335 NLRB 142 (2001), and we will substitute a new notice in accordance with *Ishikawa Gasket American, Inc.*, 337 NLRB 175 (2001).

We leave to compliance the issue of whether the discriminatees would have been transferred to other jobs upon the completion of the job to which they would have been assigned but for the Respondent's refusal to hire them.

Dynamics Cabling, Inc., Westchester, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(f).

"(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including any electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the administrative judge.

Dated, Washington, D.C. April 30, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT tell our employees that job applicants for employment having an affiliation with the Union, International Brotherhood of Electrical Workers, Local Union

98, AFL–CIO, or any other labor organization, will not be hired.

WE WILL NOT refuse to hire applicants for employment because they are members of or are affiliated with a union.

WE WILL NOT suspend employees, send employees home early from work, issue employees disciplinary warnings, or discharge employees because of their membership in or activities on behalf of the Union.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days of the Board’s Order, offer William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard employment to positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed absent the discrimination against them.

WE WILL make William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard whole for any loss of earnings and other benefits suffered as a result of our unlawful refusal to hire them, less any new interim earnings, plus interest.

WE WILL, within 14 days of the date of the Board’s Order, offer Anthony Angelucci full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Angelucci whole for any loss of earnings and other benefits he may have suffered resulting from his unlawful suspension, his early dismissal from work, and his unlawful discharge, with interest.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any references to our unlawful refusal to hire William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard, and all references to Anthony Angelucci’s unlawful suspension, to his unlawful early dismissal, to the unlawful warnings issued him, and to his unlawful discharge, and WE WILL, within 3 days thereafter, notify the above employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

NETWORK DYNAMICS CABLING, INC.

Deena E. Kobell and Wendy B. Silver, Esqs., for the General Counsel.

Christopher J. Murphy, Esq., for the Respondent.

Richard C. McNeil Jr., Esq., for the Charging Party.

DECISION

GEORGE ALEMÁN, Administrative Law Judge. Pursuant to separate unfair labor practice charges filed by International Brotherhood of Electrical Workers, Local Union 98, AFL–CIO (the Union), the Regional Director for Region 4 of the National Labor Relations Board (the Board) on July 19, 2000 issued a consolidated complaint and notice of hearing alleging that Network Dynamics Cabling, Inc. (the Respondent or NDC) had violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).¹

Specifically, the consolidated complaint, as amended at the hearing, alleges, inter alia, that the Respondent violated Section 8(a)(1) by telling an employee that it was looking for job applicants that were not affiliated with a union, and violated Section 8(a)(3) by failing and refusing to hire or consider for hire job applicants William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard because of their union affiliation.² The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) by taking disciplining and thereafter terminating employee Anthony Angelucci for his union activities.³ The Respondent filed a timely answer to the complaint denying that it had violated the Act.

A hearing on the above allegations was held in Philadelphia, Pennsylvania from November 6–9, 2000 at which all parties were afforded a full opportunity to appear, to call and examine witnesses, to submit oral as well as written evidence, and to argue orally on the record. On the basis of the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Pennsylvania corporation with its principal facility in West Chester, Pennsylvania, is engaged in the installation of low voltage telecommunications cabling. During the year preceding issuance of the complaint, a representative period, the Respondent, in the conduct of its business operations, performed services valued in excess of \$50,000 outside the Commonwealth of Pennsylvania. The complaint alleges, the Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ The July 19, 2000 consolidated complaint was received into evidence as GC Exh. 1(jj).

² At the start of the hearing, the parties entered into several settlement agreements resolving other allegations in the complaint. See Jt. Exhs. 1(a)–1(e).

³ The complaint was amended at the hearing to allege that the Respondent further violated Sec. 8(a)(3) and (1) by issuing two disciplinary writeups to Angelucci on May 5, 1999 (Tr. 19). Over the Respondent’s objection, the General Counsel was permitted to further amend the complaint to include an additional remedy (see GC Exh. 2).

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As of the hearing date, Respondent employed 120 employees nationwide, 35 of whom worked at its West Chester facility. Mark Stout serves as its current president, having apparently replaced one Rob DesRuisseaux. Todd Stevenson serves as Respondent's Director of Operations, and Paul Moore and David Maston as Senior Project Managers.⁴ All are admitted supervisors under the Act. The record reflects that in the Fall of 1996, the Union began an effort to organize Respondent's employees. Thus, during that period, Union representative Ed Coppinger sought unsuccessfully to have DesRuisseaux sign a collective bargaining agreement with the Union.

Alleged discriminatee Poston had been a dues paying member of Local 98 from 1993 until 1995, at which point he began collecting a Union pension on reaching 62 years of age. Since then, Poston has not paid any Union dues. Despite receiving a pension, Poston testified he continued looking for work because he likes to keep himself active. In July 1997, Poston attended a job fair and obtained employment through Aerotek, Inc., an admitted joint employer with Respondent, at the latter's jobsite in Beaver College, Pennsylvania.

On or about August 8, 1997, Poston and Union member, John Kosovan, engaged in picketing during their own time at the Beaver College jobsite in an effort to organize the Respondent. Poston explained that he engaged in picketing activity to protest the low salary he was getting, and to obtain a \$2 per hour pay increase. On reporting for work at their regular scheduled time that day, NDC project manager, Bruce Osborn, Poston's supervisor, informed Poston and Kosovan they were let go because of their activities on behalf of the Union. On August 13, Poston was reinstated at the Beaver College jobsite, and on the following day, August 14, again engaged in picketing at the jobsite during his nonwork hours. On reporting to work on August 14, Poston was again terminated for his Union activities.⁵ Poston testified, without contradiction, that following his last termination, Osborn told him he had been one of his best workers.

On November 12, 1997, Respondent placed an ad in the "Delaware Daily Local News" seeking entry-level technicians for various projects it anticipated working on in the near future, including an Austin, Texas job it expected to receive and begin working on in late February 1998, from its major client, First-USA, a national credit card issuer.⁶ A document prepared by Respondent and received into evidence as General Counsel Exhibit 3 contains a list of numerous help wanted ads placed by Respondent in local newspapers between 1996 and 1999.⁷ At

the hearing, Maston, who has worked for Respondent for eight years, testified that while the Respondent will at times advertise for workers, it nevertheless has long maintained a hiring practice of first asking its current employees for referrals. Employees who successfully referred other employees for hire, Maston claims, were paid a \$250. incentive bonus for the referral. (Tr. 369.) He claims that on occasions when Respondent needed to hire, he would routinely circulate a memo to employees asking for referrals. If that proved unsuccessful, Respondent would then ask the local trade schools for referrals. Only when it was unable to meet its hiring demand via these two sources would the Respondent, according to Maston, resort to placing a help wanted ad in a local newspaper.

At the hearing, the General Counsel produced a signed statement submitted by Maston to the Board on May 18, 1998 in response to the refusal-to-hire allegation wherein Maston describes Respondent's hiring practice as consisting of "[plac-ing] an ad in the newspaper and waiting for responses." No-where in his signed declaration to the Board does Maston mention the above-described employee-referral policy as Respon-dent's primary recruitment method. Maston at the hearing admitted to an inconsistency between his testimony and the statement contained in his signed declaration, and sought to explain it away by claiming that the statement he gave the Board was false, that it had been prepared for him in advance by NDC's then attorney, Randall Schauer, and that he signed and allowed it to be submitted to the Board despite knowing of its alleged inaccuracies because he had been instructed by NDC's owner to do whatever the attorney asked him to do. (Tr. 369-370; 401.)

I found Maston's testimony in this regard wholly unbeliev-able. Neither the NDC owner who purportedly instructed Mas-ton to blindly follow attorney Schauer's instructions, nor attor-ney Schauer himself, was called to corroborate, deny, or ex-plain Maston's account. I am, in any event, convinced that had they been called, neither the NDC owner nor Schauer would have corroborated, and indeed would more likely than not have disavowed, Maston's rather audacious claim that they in-structed him to sign and submit to the Board what Maston claims is a false declaration. I find that Maston was not being truthful at the hearing in asserting that the Respondent relies on employee and trade school referrals as its primary hiring source. While I do not doubt that the Respondent may on occa-sion hire individuals referred to it by other employees, as oc-curred with the hiring of employee Anthony Angelucci (dis-cussed below), I nevertheless find that, as described by Maston in his May 18, 1998, signed statement to the Board, the help-wanted ads it places in local newspapers, not employee refer-als, constitutes Respondent's primary hiring source. In this regard, I reject as without merit Maston's claim at the hearing that the contrary statements found in his signed declaration to the Board are false. Rather, I am convinced that it was Mas-ton's testimony at the hearing, not the averments made by him in the signed statement, which was false and which, I find, he intentionally tailored to fit Respondent's defense to the refusal-

⁴ Maston, at the time of the unlawful conduct alleged in the com-plaint, served as operations manager.

⁵ See all-party stipulation received into evidence as Jt. Exh. 2A.

⁶ Maston testified that the Austin job "started off slowly" on Febru-ary 22, 1998, and did not pick up and level off until mid-March. (Tr. 391.)

⁷ The Respondent admits that GC Exh. 33 is an incomplete list as it did not retain actual copies of all the ads run during that period. It further admits that the list represents only its recollection of which ads were placed and when they were run, and that it may indeed have run

more ads than shown in the list. One such ad placed in March 1998, discussed *infra*, is not listed in GC Exh. 33.

to-hire allegation. My finding that newspaper ads, not employee referrals, was Respondent's primary hiring source is bolstered by the testimony of alleged discriminatee Della Vella, and Union members Thomas Castaldi and Robert McKay, who testified that they were told by an NDC receptionist and by Stevenson during a March, 1999 visit to NDC's office, that NDC's method of hiring is to advertise for workers in local newspapers (see discussion below). In sum, I find that Maston lied at the hearing regarding Respondent's actual hiring practice, and consequently reject as not credible his claim that he was somehow pressured or instructed by an NDC owner and by its former counsel, Schauer, to submit a false written declaration to the Board. Maston's willingness to fabricate his testimony on this matter undermines, in my view, his entire testimony in this case.

Regarding the November 1997, hiring, Maston claims he adhered to the "employee referral" practice in attempting to obtain workers. Thus, he testified that before placing the November 1997 ad, he first circulated a memo to employees asking for referrals, and then contacted the trade schools, both of which proved unsuccessful. (Tr. 381.) Maston's purported memo to employees was not produced at the hearing.⁸

NDC hired at least three individuals—Anthony Juliano, Michael Kennedy, Christian Thwaites—who responded to the ad.⁹ Juliano faxed his resume to Respondent on November 17, 1997, was interviewed and hired by Maston on November 25, 1997, and began work on December 1, 1997. Kennedy faxed his

resume on November 18, 1997, was interviewed on December 3, 1997 by Maston and NDC Senior Project Manager Paul Moore, offered employment following the interview, and began working for Respondent on December 8, 1997. Thwaites faxed his resume to Respondent on November 24, 1997, was interviewed and hired by Maston on November 26, 1997, and began working on December 1, 1997. At the time of their hire, the Respondent was unaware that all three were members of the Union. (Jt. Exh. 4B).

In January 1998,¹⁰ Coppinger again sought to persuade DesRuisseaux to sign a collective bargaining agreement with the Union. DesRuisseaux promised to get to back to him. Not having heard from DesRuisseaux, Coppinger, on February 26, sent DesRuisseaux a letter with a copy of the proposed agreement. On March 2, DesRuisseaux responded that he was not interested in signing any union agreement.

In February, the Union stepped up its efforts to organize Respondent's employees. On February 20, Coppinger sent a mailing to NDC employees generally comparing the benefits they were receiving with those received by employees under its collective bargaining agreements, and encouraging employees to contact him. (R. Exh. 2.) In response, the Respondent, as shown by facts contained in several all-party stipulations, engaged in efforts of its own to thwart the Union's efforts and to ascertain who the Union supporters were.

The undisputed facts show that Juliano was the recipient of much of Respondent's anti-union activity.¹¹ On February 17, for example, NDC's Project Manager at the Easton Hospital jobsite, John Czyzewski, made several union-related statements to Juliano. Czyzewski that day asked Juliano if he had received a letter from the Union, and during another conversation with Juliano at the Lonestar Steakhouse in Easton, PA, told Juliano that if employees selected the Union as their bargaining representative, he (Czyzewski) and other employees were going to start a new company, that a lot of NDC employees would be laid off because Respondent would not be able to competitively bid for jobs, and that he, Juliano, would be laid off because he did not have enough experience in the field. Czyzewski also urged Juliano to vote against the Union if an election were held.

On February 23, Czyzewski again questioned Juliano on several occasions about the Union. Thus, it is undisputed that Czyzewski asked Juliano if he had received a new letter from the Union, whether he was "the guy working for Local 98," and if he had been on the phone talking to Coppinger. (Jt. Exh. 2B.) On March 3, NDC's project manager at a Burger King Restaurant jobsite, Greg Brown, told Juliano and four other NDC employees that he believed NDC employee, Doug Thornton, was the Union's organizer at NDC. On March 12, the Union notified the Respondent in writing of Juliano's status as Union organizer. The following day, the Respondent distributed copies of the Union's March 12, letter to its employees via the employee mailbox.

⁸ During its cross-examination of Maston, Respondent's counsel produced an interoffice memo purportedly sent by Stevenson to employees on May 21, 1999 asking for referrals, for the purpose of corroborating Maston's testimony regarding NDC's alleged adherence to a practice of relying on employee referrals to obtain workers. (See rejected R. Exh. 11.) The General Counsel objected to the production and introduction into evidence of the Stevenson memo on grounds that the document had been subpoenaed by her, but not turned over by Respondent, prior to the hearing, and should, therefore, be excluded under *Bannon Mills*, 146 NLRB 611 (1964). I agreed with the General Counsel and denied the Respondent's use of the document to question Maston and to have it introduced as evidence in this proceeding. Stevenson's memo would not, in any event, have corroborated Maston's claim that he distributed a memo to employees in November 1997, for Stevenson's interoffice memo was purportedly prepared in connection with hiring that was to occur at some point after May 21, 1999, a year and a half after Maston's November 1997 hiring. Respondent could have, but, as noted, did not, produce the memo Maston claims he distributed to employees in connection with the November 1997 hiring. No claim has been made here by the Respondent that the memo was either lost, destroyed, or otherwise unavailable for production. The only evidence regarding the availability of the memos came from Maston, who testified only that he was not sure whether or not the memos had been retained. In the absence of any explanation for its nonproduction, I draw an adverse inference and find that Maston never prepared or circulated any such letter to employees asking for referrals, and that he was being untruthful in asserting that he had in order to bolster Respondent's defense to the refusal-to-hire allegation.

⁹ Juliano, Kennedy, and Thwaites were actually covert "salts" for the Union. The term "salt" refers to a Union member who seeks employment with a non-union company in order to organize it from within. The Union has two types of "salts", e.g., the overt "salt" who willingly reveals his or her union affiliation when applying for work with the non-union company, and the covert "salt" who does not.

¹⁰ All dates hereinafter are in 1998, unless otherwise indicated.

¹¹ A settlement agreement entered into by the parties resolving allegations of unfair labor practices directed at Juliano was received into evidence as Jt. Exhs. 1A and 1B.

On March 16, Juliano, during his nonworking hours, assisted union organizers and alleged discriminatees, Della Vella and Corazo, distributed union literature at Respondent's First USA jobsite in Wilmington, Delaware. At one point, NDC's project manager at the site, Mark Bianco, told Juliano to "get the hell out of there." Juliano responded that he was acting with other employees for their mutual aid and protection, and repeated the same refrain when Bianco asked how much the Union was paying him for his activities. Bianco then threatened to "ring" Juliano's neck, commenting that he wanted to go outside and "get" Juliano. Bianco further told NDC employees that Respondent would give \$100 to "Bill the electrician" to go outside and stomp on the Union handbillers. Bianco then commented to the employees that "there were many ways NDC could get rid of Juliano, including writing him up for everything including latenesses."

Following his March 16, handbilling activities, Juliano returned to work but arrived 4 minutes late. He was then issued a written warning by Maston for lateness. Another employee, Dan Pearson, who arrived late that same day, also received a written warning. Respondent stipulated that it gave Juliano the warning because he engaged in the handbilling activity and had otherwise assisted and supported the Union, and that it issued the warning to Pearson in order to justify Juliano's warning. (Jt. Exh. 2C.) Later that day, Czyzewski received a call from Bianco, and as he was heading out to go to the Easton jobsite, Czyzewski said to Juliano, "I heard you had a busy morning." Later that evening, Czyzewski told Juliano, "I know you will be talking to Della Vella; tell him not to—(expletive deleted) call me anymore." At some point that same evening, Czyzewski pulled Juliano aside and said, "I respect what you are doing, but I have my job to do and Bianco called me is irate about this morning." (Jt. Exh. 2C.)

The next day, March 16, Juliano again joined Della Vella and Corazo in their handbilling activities, but this time at the Easton Hospital jobsite. When he reported to work later that day, Czyzewski told Juliano that he was out of his mind for what was doing, and commented that if the Union representatives entered the hospital, he would have them escorted out. As Juliano followed Czyzewski to the jobsite, Czyzewski stopped him. When Juliano asked if he was being terminated, Czyzewski stated he was not, but that he was going to meet with hospital officials to discuss Juliano's handbilling activities that morning.

Some 10 minutes later, Czyzewski returned to the work area and began screaming at Juliano that he had gone too far and that he, Czyzewski, was ready to snap. Two employees who witnessed Czyzewski's remarks told Juliano that he, Juliano, was taking food off their tables because of his union activities. Czyzewski then stated he was not going to deal with Juliano and his handbilling anymore, and directed him to pack up his tools because Czyzewski was going to let the shop deal with Juliano from then on. Czyzewski escorted Juliano to the elevator door and asked him to leave.

Juliano called the shop and spoke to Maston. He told Maston he wanted to work but that Czyzewski did not want him working at the Easton jobsite. Maston agreed to speak with Czyzewski about the matter. Juliano called Maston again a

short while later, but was told by Maston that Czyzewski did not need him at the Easton jobsite anymore, to go back to the hotel and pack his things, and drive back to Respondent's West Chester facility. Juliano did just that, arriving at the shop around 3 p.m. When he got there, Maston told Juliano he expected him back at the shop much sooner, and proceeded to issue him a written warning for arriving late.

Maston then assigned Juliano to perform patch cable work, something Juliano had not done before, with specific instructions that he was to produce one patch cable every four minutes. At the end of his shift, Maston told Juliano that he would document the latter's performance from then on, and that his start time would henceforth be 8 a.m., rather than 7:30 a.m., the regular start time for other technicians.

On March 18, Maston and NDC Purchasing Manager Scott Adams reviewed Juliano's work and at the end of the day asked him to sign a document that tracked his performance that day, something he had never before been asked to do. Also, that same day, DesRuisseaux told Juliano that he had removed Juliano off the Easton jobsite because he had "pissed off a lot of guys" at that site.

On March 23, DesRuisseaux held an employee meeting during which he told employees that he wanted his company to remain non-union, and that if employees voted for the Union, they could all be laid off. He further told employees that without a union, complaints could be brought directly to him. DesRuisseaux also passed out literature during the meeting explaining that once they voted the Union in, decertifying it would be difficult. The literature was collected from employees at the end of the meeting.

Later that morning, Juliano, wearing a T-shirt to work with the words "Union Yes" and Union logo on it, asked Maston if he could take a half day off the following day. When Maston asked if it was important for him to take the time off, Juliano stated it was, and that he wanted the time off to express his First Amendment rights. Maston replied he would get back to him. Later that afternoon, Maston instructed Juliano to wear an NDC T-Shirt to work from then on. It is undisputed that Juliano and other employees had on previous occasions worn non-NDC T-shirts without incident. He also told Juliano that his request for time off was being denied because he was behind in his work. Maston also handed a document for Juliano to sign stating that if he made his quota of patch cable, NDC would consider his request for time off provided he gave 48 hours notice. Juliano was asked to and did sign the document. Respondent maintained no policy requiring 48 hours notice before requesting time off.

On March 24, Juliano did not report to work or call in to say he would not be in. Instead, he went to the First USA jobsite where he was observed engaging in Union handbilling by Adams and NDC Vice President, Mark Stout. At around 12:25 p.m. reported for work, at which point DesRuisseaux and Maston notified him he was being terminated for insubordination as he had failed to report for work that morning following the denial of his request for time off.

On March 26, Bianco told two employees at the First USA jobsite that Maston had set up Juliano with a contract entitling him to have a personal day off provided his work was up to par

in order to fire him. That same morning, Bianco told three other employees that he had a friend in the towing business and that he would like to find out what kind of cars Della Vella and Juliano drove so that he could have their cars towed. He further stated that Juliano was getting on his nerves and that he wanted to rip out his spine, and threatened to take his truck and run Juliano and the other Union representatives over and “take them all out.”

In early April, Juliano engaged in further handbilling at the First USA jobsite. It is undisputed that Bianco observed him doing so and commented to three employees that he wanted to go outside and hit Juliano over the head with a crowbar.

Thwaites testified that on April 9, he had a conversation with Moore at NDC’s warehouse on a variety of matters, including a job he had just done in Princeton, NJ that day. He claims that at one point during this conversation, Moore asked him if he knew anyone that was looking for work, but that the individual could not be affiliated with the union. He purportedly further commented that Juliano “was a fool,” and that the Union “was just using him.” Thwaites claims he didn’t respond to Moore’s comments and simply agreed with him because he didn’t want Moore to learn that he too was helping the Union in its organizing efforts.

Asked generally by Respondent’s counsel if he ever told an employee that NDC was looking for employees but that they had to be nonunion, Moore, at first, emphatically denied making any such remark. However, when asked the same question by the Charging Party’s attorney, Moore wavered in his answer and stated only that he did not *recall* ever having made such a statement. Moore, it should be noted, did not deny having a conversation with Thwaites on April 9, or telling Thwaites that Juliano was a fool who was being used by the Union. I reject Moore’s ambiguous denial and, instead, credit Thwaites and find that Moore made the April 9, statements attributed to him by Thwaites. Moore’s remarks, it should be noted, implicitly suggest that the Respondent was seeking workers.

On April 20, Bianco asked two employees if they had received any phone calls from the Union. He then remarked that he would like to have Della Vella’s home phone number so he harass him by calling and then hanging up, and if that didn’t work, he would call and click his .38 caliber revolver into phone and ask Della Vella if he knew who it was. If that did not work, he would call and click his shotgun into the phone to ensure that Della Vella got the message. (Jt. Exh. 3F.)

In early March, Respondent placed a blind ad in the *Delaware Daily Local News*, that ran through March 8,¹² seeking entry-level technicians with “good communications skills” who were “mechanically inclined.” Maston explained that he ran the ad after an unsuccessful attempt to obtain workers through employee referrals, and that Respondent planned on hiring “approximately 6 to 8 new employees” to cover several First USA projects in Plano, Texas, Orlando, Florida, and in Wester-

ville and Kettering, Ohio, it expected to begin working on in late March and early April. NDC, it should be noted, was already working on projects for other clients when the ad was placed in early March. (Tr. 391; 407). As with the November ad, the Respondent did not produce any memo from Maston to employees soliciting referrals. Accordingly, I find that no such memo was prepared.

On March 8, Coppinger responded to the ad by sending a letter on Union stationery to the ad’s P.O. address containing the name, phone number, and address of alleged discriminatees Della Vella, Corazo, Poston, and Pritchard, and stating that all four were willing to work at the entry-level wage. Coppinger also faxed a copy of the letter to the Respondent on March 9. On March 10, Della Vella and Corazo called NDC and spoke to Office Manager Patricia Barbo, who admitted receiving Coppinger’s fax, and told both “that to be considered for the positions each applicant needed to submit a resume to NDC by March 13.” (Jt. Exh. 5A.) In response to their inquiry of whether they could submit applications instead of resumes, Barbo responded, “Yes,” and, in further response to Della Vella’s inquiry, told him he could bring the job applications for the other individuals named in Coppinger’s letter.

On March 11, Della Vella and Corazo visited Respondent’s office and turned in applications for themselves and for Poston and Pritchard to Maston. At the time, both were wearing union jackets. The job applications identified all four as union members. After handing Maston the applications, Maston told them he would “take care of it,” and then commented that he liked their jackets. Della Vella replied that “he had plenty more, one for each of his men.” While not denying being present when Della Vella and Corazo showed up on March 11, to turn in their applications, Maston at the hearing denied that the applications were handed directly to him, stating, “I don’t believe it was myself that accepted them, but I think somebody in our office did take those applications.” His testimony in this regard, however, conflicts with the Respondent’s admission at paragraph 4 of the all-party stipulation contained in Jt. Exh. 5A reflecting that Maston was indeed handed and accepted the applications from Della Vella and Corazo, while commenting that he “would take care of it.”

Between March 2 and March 16, the Respondent received some 26 resumes in response to the March ad (see GC Exh. 27.) Maston testified that as the resumes and applications came in, he placed them in a file and reviewed them a few days later to ascertain, based on the experience contained in the resumes or applications, which of the applicants he should call. He claims that over-qualification of an applicant “was really the big factor” and that those he deemed to be overqualified for the entry-level positions generally would not be called. He explained that NDC preferred not to hire experienced applicants for said positions because they often brought with them poor work habits picked up while working for other employers requiring that they be “detrained,” whereas applicants with no experience needed no such retraining. Following review of an applicant’s qualifications, Maston would call and discuss the job and salary requirements with the applicant and would then schedule the applicant for an interview if the terms of employment were acceptable. (Tr. 410–411.)

¹² The record is somewhat conflicting on when precisely the ad was placed. Thus, Jt. Exh. 6A shows the March ad as having been placed on the Internet and in newspaper versions of the *Delaware Daily Local News* on March 8, while Jt. Exh. 5A states that NDC ran a blind ad “on or about March 1 through 8.”

In the evening of March 11, Maston called fourteen of the applicants whose resumes had been received and reviewed by him prior thereto.¹³ Of those he called, some indicated they were no longer interested in a position, others found the \$750-\$950 salary range quoted by Maston too low, and a few agreed to interviews with Maston which were scheduled for March 17.¹⁴ Maston explained that the other applicants, including Della Vella, Corazo, Poston, and Pritchard, were not called because he “probably didn’t get [their resumes or applications] before I had time to prepare my initial calling of the ones” he did call. Maston admits he never reviewed the applications submitted to him by Della Vella, Corazo, Poston, or Pritchard on the morning of March 11.

Della Vella testified, without contradiction, that he called NDC several times after submitting his application to inquire about its status, and was told each time by Barbo, “We’re looking into it; we’ll get back to you; we’ll let you know.” (Tr. 150.) Barbo did not testify. I credit Della Vella. Corazo likewise testified, credibly and without contradiction, that he repeatedly calling NDC to inquire about his job application and was told that no one was available to speak with him at the time and to leave his name and phone number and someone would return his call. Poston testified he called Maston on April 1, and again on April 3, to inquire about his application, and left Maston a voice mail stating he had sent in a resume and was looking for work. He claims that Maston returned his April 3, call and that, when Poston told him he was looking for work, Maston told him all positions had been filled and that he would keep Poston in mind. Maston did not recall having any such conversation with Poston. (Tr. 243, 414). I credit Poston and find that Maston on April 3, told Poston that all positions had already been filled.

On May 5, Coppinger sent NDC a letter stating that Della Vella, Corazo, Pritchard, and Poston had applied for work on or before March 8, were still interested in employment and were available for immediate interviews, and would accept employment at the wage and benefits standards offered by NDC. He

sent an identical letter to NDC on June 23. (GC Exhs. 13; 14). The Respondent did not respond to either letter.¹⁵

Maston testified that after placing the ad, Respondent’s immediate need for additional workers “disappeared” when the various FirstUSA projects it expected to begin working on in late March and early April were delayed or pushed back several months. As a result, the Respondent, Maston claims, opted not to hire anyone at that time, including those who had responded to the March ad. The Respondent, instead, according to Maston, delayed hiring until the projects fully got under way sometime around October, and that when it did begin hiring, it did so by hiring workers through its purported employee referral policy. Stevenson also claims that employees hired after the March ad came from referrals and trade schools. (Tr. 399; 578, 612).¹⁶

Alleged discriminatee Angelucci was hired by Respondent in mid-August.¹⁵ Angelucci testified prior to being hired, he was

¹⁵ The May 5, and June 23, letters are not entirely accurate, for the letter sent by Coppinger to NDC in March, asking that Della Vella, Corazo, Pritchard, and Poston be considered for the entry level positions advertised in the March 1, ad, is dated March 9, and presumably could not have been sent on or before March 8, as claimed by Coppinger in his May and June letters.

¹⁶ A list of individuals hired following placement of the March ad is found in Jt. Exh. 4B. Thus, that list shows that the Respondent hired three individuals in April, one in May, one in June, two in July, two in August, two in September, and six in October. According to Maston, the first twelve individuals shown on the list as having been hired between April 13, and October 6, were hired using Respondent’s purported employee referral policy, and were hired based on referrals either from an NDC employee or supervisor, or by a local trade school. (Tr. 416–418). I found Maston’s testimony in this regard unconvincing. While there is no hard evidence to refute Maston’s claim in this regard, there is likewise no credible evidence to corroborate it. One sure way the Respondent could have corroborated Maston’s testimony was by producing, either through payroll records or via testimonial evidence, proof that it had paid those employees who successfully referred applicants to it the \$250 incentive bonus Maston claims had been Respondent’s customary practice during his 8-year tenure with NDC. No such evidence, however, was produced, leading me to believe that either no such payments were ever made and Maston simply lied about the existence of such a practice, or the Respondent did not hire any individuals from employee referrals, again undercutting Maston’s claim in this regard. Indeed, Maston himself seemed unsure on precisely how all the employees hired after April 13, came to be hired. Thus, when asked what procedures he had used to hire employees, Maston replied, “I would just say the normal procedures that we always used, which was the referral being the first thing. *I don’t think that we hired anybody from an ad after that. I don’t recall.*” (Tr. 399–400). Maston’s rather ambiguous testimony in this regard, coupled with what I find to have been his overall lack of candor in other areas of his testimony and his willingness to fabricate testimony, and the fact that the Respondent’s primary hiring method was through newspaper ads and not through referrals, leads me to reject his and Stevenson’s uncorroborated claim that all employees hired on April 13, and thereafter were obtained through referrals from its own employees and supervisors, and from trade schools.

¹⁵ Angelucci, it should be noted, was hired by way of a referral from his friend and NDC supervisor, Doug Thornton. The fact that Angelucci came to be hired by way of a referral does not, in my view, establish that this was Respondent’s usual practice. Rather, I am convinced that while the Respondent may have occasionally hired someone re-

¹³ Maston testified that he placed his calls to the applicants at night because oftentimes he could not reach them during the day as they would either be working or otherwise unavailable to take his calls.

¹⁴ A “reply by March 30” notation on the resume of one applicant, Bernard Taraschi, suggests that Maston offered him employment. Although admitting that he interviewed Taraschi on March 17, Maston was uncertain if he offered Taraschi a position, but could not explain what the notation meant. Maston’s testimony in this regard was simply not credible. I am convinced that the notation does reflect that Maston offered Taraschi a job following his interview, and that Maston’s sudden lapse in memory as to the meaning of his “reply by March 30” notation was an attempt by Maston to avoid admitting that he was, in fact, engaged in a hiring process following receipt of the March applications. The record does not reveal what became of Taraschi. Maston also scheduled applicant Gustav Hoecht for a March 17, interview, but a “No show-no call” notation indicates that Hoecht never appeared for the interview. (see GC Exh. 27). Unlike his “reply by March 30” notation on Taraschi’s resume, Maston had no difficulty explaining the meaning of the “no show-no call” notation on Hoecht’s resume.

interviewed by Thornton and Stout.. He recalls that after Thornton handed him the application to fill out, Stout asked him, "You're not one of the f---king union guys, are you?" Angelucci truthfully answered that he was not,¹⁶ and Stout then said "OK," proceeded to explain the type of work done at NDC, and then instructed him to fill out the application and return it when he was finished.¹⁷ On August 22, Angelucci began working for Respondent as a cable technician. On April 20, 1999, Angelucci joined the Union and thereafter assisted the Union in its organizational activities by handbilling at different NDC jobsites, including its Philadelphia Suburban Water Co. and "Signal" jobsites,¹⁸ and by discussing the Union with employees before and after work, and during his lunch break. Also, on April 20, Coppinger sent Respondent, and the latter admits receiving, a letter advising it of Angelucci's status as a Union organizer, and stating that Angelucci would be engaging in organizing activities during non-working hours (GC Exh. 15; RB:33).

On April 28, Angelucci, foreman Dave Bower, and employee Mike Polito were working at Respondent's Signal jobsite. Angelucci testified that at around 11:30 a.m., Bower asked Angelucci if he would stay on the job while he (Bower) and Polito took their lunch break, and that Angelucci could take his lunch break when they returned. Angelucci agreed and continued working. When Polito and Bower returned, Angelucci took his lunch break and, during that break, engaged in handbilling activity. Soon thereafter, a Liberty Property management agent approached and asked to see a copy of the handbill. On reviewing it, the Liberty agent told Angelucci he could not distribute the literature at the premises and would have to leave. Angelucci replied that he was working with Polito and Bower at the jobsite and was merely exercising his First Amendment rights. A short while later, the Liberty agent showed the handbill to Bower. Bower became angry at Angelucci and remarked, "What the 'F' was I doing this to him for?", and stated, "That's it, I've got to call Todd [Stevenson]." Bower apparently called Stevenson and soon thereafter told Angelucci that Stevenson wanted to see him in his office right away. Neither Bower, Polito, nor the Liberty management representative were called to testify. Accordingly, I credit Angelucci's above undisputed account of the incident.¹⁹

Angelucci met with Stevenson and Maston in the former's office about one hour later. According to Angelucci, Stevenson asked him what he was doing "handing this shit out on the jobsite," and accused Angelucci of handbilling during his working time. Stevenson claimed at the hearing that Angelucci had

been instructed by Bower on April 28, to take his lunch break at the same time he and Polito took theirs, and that Angelucci refused to do so, conduct which Stevenson contends amounted to insubordination.²⁰ Angelucci told him he had a right to handbill, and denied Stevenson's accusation that the handbilling activity had occurred during his work time, insisting instead that he was on his lunch break at the time. Stevenson, Angelucci claims, then stated, "Look, we know that you are working part time as union organizer . . . for the Union," but that because of this incident, they were going to have to let him go. When Angelucci asked if he was being fired, Stevenson purportedly responded that he was not being fired, but that looking at the handbill, he, Stevenson, did not know if Angelucci would be distributing union literature at other jobsites to which he was sent. Stevenson told Angelucci to wait outside, and a short while later purportedly told Angelucci to go home and think about what he had done that day, and to report back to the shop the next morning. The next day, Angelucci received a written memo from Stevenson stating he had been suspended for a half-day for passing out "union-related literature on private, non-company property and on working time." The memo cautioned Angelucci that "any similar conduct in the future will result in your immediate dismissal." (GC Exh. 16).

Stevenson's testimony on why he suspended Angelucci was confusing and contradictory. Thus, in response to questioning by Respondent's counsel, Stevenson claimed that he suspended Angelucci based on a report from the property manager at the Signal jobsite stating that Angelucci had been handbilling "on working times and in working areas." Asked if he would have suspended Angelucci had the latter "been handbilling on his own, in non-Company . . . non-work areas," Stevenson admitted that he could not have done so. Yet, the memo that Stevenson gave to Angelucci notifying him of the suspension suggests that Angelucci's handbilling activity did in fact take place in a nonwork area. Thus, the memo, as previously pointed out, states that Angelucci was being suspended for distributing union literature "on private, non-company property." Elsewhere in his testimony, Stevenson, in response to questioning by the General Counsel, asserted that he suspended Angelucci for handbilling "during working hours and irritating clients," but made no mention of the activity having occurred in a "work area." (Tr. 556;582) Stevenson admits he had no first-hand knowledge of how, when, or where Angelucci conducted his handbilling activities on April 28. The Signal property manager, Bower and Polito, all of whom purportedly served as Stevenson's source of information regarding this incident, were not called to testify, leaving unsubstantiated Stevenson's assertion that Angelucci had conducted his handbilling activities "work areas."

Nor is there any support for Stevenson's additional claim that Angelucci's handbilling occurred during work time. The

ferred to it by another employee or supervisor, its primary hiring method was through newspaper ads.

¹⁶ Angelucci became a Union member on or about April 20, 1999.

¹⁷ Thornton was not called as a witness, and while Stout did testify, he was not asked to confirm or deny the remarks attributed to him by Angelucci during the interview. Accordingly, I credit Angelucci.

¹⁸ The Signal jobsite was at a facility owned by Liberty Property Management Company.

¹⁹ A handwritten report of the incident, presumably prepared by Bower, was received into evidence without objection as GC Exh. 42. Nothing in that report contradicts Angelucci's claim that his handbilling occurred during his lunch break.

²⁰ Stevenson did not explain how he knew that Angelucci had been instructed to take his lunch break along with Bower and Polito. Bower's handwritten memo, it should be noted, makes no mention of Angelucci having been so instructed by Bower. I seriously doubt that had Angelucci failed to comply with such a directive from Bower, the latter would not have made reference to Angelucci's alleged "insubordinate" behavior in his memo.

only two individuals who might have corroborated Stevenson's claim, Bower and Polito, as noted, did not testify. Bower's handwritten description of the incident likewise offers no support for Stevenson's claim, for while Bower's memo states that Angelucci was observed handbilling at around 12:15 p.m., on April 28, it does not state that Angelucci did so during his work time or that he was not on lunch break when he engaged in such activity. Indeed, Bower's statement therein, that he and Polito took lunch together at 11:33 a.m., and resumed work at around 12:10 p.m., appears to corroborate Angelucci's claim that, on instructions from Bower, he took his lunch break after Bower and Polito returned from their break, e.g., at around 12:15 p.m. In short, I accept Angelucci's testimony and find that he was indeed on his lunch break when he distributed the union literature on April 28.

A few days later, according to Angelucci, DesRuisseaux called him to his office and, during their conversation, stated that if Angelucci thought he was going to unionize his company, "it was just never going to happen." He then asked what Angelucci was trying to gain out of all of this, whether it was "money, pensions, benefits." Angelucci shrugged his shoulders and stated he did not know, at which point DesRuisseaux told him that was all he had for Angelucci that day. (Tr. 302) DesRuisseaux did not testify. Accordingly, I credit Angelucci and find that DesRuisseaux made the above comment to Angelucci.

The next day, May 4, Angelucci was assigned to work at NDC's UPS jobsite in Willow Grove, PA, along with Bower and Czyzewski. During his lunch hour, Angelucci began distributing union literature and, at one point towards the end of his lunch hour, handed a leaflet to the guard on duty at the front gate. As he headed back to work, Angelucci noticed Bower talking to the guard. Five minutes later, Bower approached Angelucci and, appearing frustrated, commented, "Why do you keep doing this to me?" and handed him the handbill Angelucci had given to the guard. Bower then instructed Angelucci to finish up, pack up his tools, because that was it for the day. Angelucci testified that there remained work to be done at the site, and that neither Bower nor Czyzewski left the site after he was asked to leave.

On May 5, Angelucci, whose normal reporting time was 7:30 a.m., arrived about one hour late. He explained that his late arrival was due to a traffic accident he encountered on his way to work which caused a 2-hour backup, and that other employees showed up late to work that morning. Angelucci claims that on arriving to work that morning, he was told he could either work in the warehouse that day or go home, and that he decided to go home.

Stevenson's recollection is that when Angelucci arrived late for work on May 5, he told the latter that other employees who lived in the same general area as Angelucci had arrived to work on time, and that Angelucci could have at least called to say he would be late. According to Stevenson, Angelucci was scheduled to return to the Willow Grove jobsite that day, but because all the other employees had already been sent to the site, he "believes" he instructed Angelucci to remain in the shop and help out employee Todd Launi at the warehouse. His testimony on whether he gave Angelucci the option of remaining at the facility or going home was somewhat ambiguous. Thus, asked

if he had given Angelucci such an option, Stevenson initially could not recall if he did or not, stating in this regard, "I don't recall. I don't remember if I did or not." However, he subsequently added "I think—no; no; I told him to go out and help . . . in the warehouse." Angelucci, as it turned out, went home. According to Stevenson, that same day, he issued Angelucci two separate warnings, one for arriving late to work, the other for leaving work early. (GC Exhs. 18A; 18B).

When Angelucci reported for work the next day, Stevenson called him aside and told he was being suspended a half-day for leaving work early the day before. Angelucci questioned why Stevenson was suspending him since the latter had given him the option of working in the warehouse or going home. However, Stevenson, according to Angelucci, did not want to discuss it and simply handed him two warnings that had been prepared. According to Angelucci, when Stevenson asked him to sign the write-ups, Angelucci told him he wanted to review them before he signed. Stevenson, however, grabbed the write-ups from Angelucci and told him, "You won't take them and review them anywhere. I'll just mark them down as a refusal to sign, and that's as good as your signature."

Stevenson's version is that when Angelucci reported for work on May 6, he told Angelucci he was being suspended pending further investigation for leaving work early the previous day, and that "he might as well just go home for the day, and we would get back to him." Following this brief conversation, Stevenson left the premises for an appointment with NDC's owner. About an hour later, however, Angelucci was notified by Moore that he was being discharged.

Moore provided limited testimony regarding the discharge. He explained that while he carried out the decision, the decision itself was made by Stevenson. According to Moore, on May 6, he was given a typed-written letter to give to Angelucci informing the latter of his discharge, and that he then walked over to Angelucci, handed him the letter, and told him NDC no longer needed his services. Angelucci, he claims, read the letter and commented he was not leaving unless the police were called. The letter gives the following reasons for Angelucci's discharge: "Voluntarily walking off the job when work was available" and "refusing [Stevenson's] direction to work in the warehouse," an obvious reference to Angelucci's May 5, conduct of leaving work early; for "reporting late for work based on a false excuse," a clear reference to Angelucci's late arrival for work on May 5; for "being suspended one half day last week," an apparent reference to the suspension given to Angelucci for his handbilling activities at the Signal jobsite; and for his "inappropriate and insubordinate conduct today." (GC Exh. 19)

Angelucci recalls that after being told by Stevenson he was being suspended, he remained on the premises for approximately 45 minutes after which, according to Angelucci, Moore, accompanied by Stout, approached him. Moore, he claims, informed Angelucci he was being terminated pending investigation of the handbilling incidents, and because of his late arrival and early departure the day before. Moore then instructed him to leave the premises immediately or the police would be called to have him removed. Angelucci replied that Moore should call the police so he, Angelucci, could have some

documentation of what had occurred that day. Stout then instructed Barbo to call the police.

Stevenson testified that about an hour after returning to his office following his brief discussion with Angelucci, he received a call from Moore telling him that Angelucci was still on the premises and was refusing to leave unless the police were called to escort him off the premises. Stevenson claims he told Moore, "What do you mean he's still there? It's [been] over an hour since he's been given this thing,"²¹ and that he instructed Moore to have Barbo prepare a termination letter. Moore, it should be noted, made no mention in his testimony of having spoken at all with Stevenson before delivering the termination letter to Angelucci. Nor does his testimony reflect that he, at Stevenson's directive, instructed Barbo to prepare the discharge letter. Rather, Moore testified only to receiving the discharge letter from someone he did not identify with instructions to deliver it to Angelucci.

Stevenson claims that Moore then "went out and told [Angelucci] that his services were no longer needed at NDC for insubordination and various other things" and handed him the letter. However, Moore in his testimony never claimed to have told Angelucci that he was being discharged for insubordination. Rather, Moore testified only that he gave the letter to Angelucci to read, and then told him his services were no longer needed. Angelucci's version of the discharge conversation, while different from Moore's, also makes no mention of Moore citing insubordination as a reason for his discharge.

Della Vella's March 1999 visit to NDC's office

Della Vella testified that in March 1999, he, Castaldi, McKay, and Union member Bobby Adams, visited Respondent's West Chester office and, once there, asked the receptionist, "Denise," if they could apply for work.²² Della Vella claims that all four of them were wearing either a Union jacket or Union hat at the time. In response to Della Vella's inquiry, Denise told Della Vella to read the sign on the front of the counter which stated that NDC was at the time not accepting applications. Della Vella then asked how he and the others could get a job with NDC. Denise replied that "the only way you can get a job here at NDC is to watch the newspaper ads. When they are hiring, they will place an ad in the newspaper." Della Vella then asked if this was the only way to get a job with NDC, or whether he could obtain work at NDC via Aerotek or some other hiring agency. Denise responded, "No, the only way to get a job here, when we are hiring, we place an ad in the newspaper." According to Della Vella, during his conversation with Denise, Stevenson showed up and reaffirmed the receptionist's remarks by stating, "that's right, you have to keep an eye on the newspaper." (Tr. 154)

Castaldi and McKay corroborated Della Vella's above testimony. Thus, Castaldi recalled Della Vella asking the receptionist, "How do we apply for jobs here?", and the latter re-

sponding, "You have to watch for an ad in the newspaper, that's how we hire." The receptionist then instructed Della Vella to read the sign on the counter. Castaldi himself did not read the sign and could not testify as to what it said. He further recalled someone coming out a side door, presumably Stevenson, and telling them they could not apply there, that they "have to do what the girl said; Look for the ad in the paper." (Tr. 281). McKay likewise recalls the receptionist responding to Della Vella's inquiry about work that "You have to look in the paper; that's how we do our hiring," and that a minute or so later, a man appeared and repeated, "We do our hiring through the newspapers." (Tr. 286).

Denise, the receptionist, did not testify. Stevenson did. He recalls Della Vella and the others showing up at the office to apply for work. He does not claim to have been present in office when Della Vella first entered and asked about work, or hearing all of the conversation Della Vella may have had with the receptionist. He does, however, admit telling Della Vella and the others "that they may want to look in the newspaper, they may find something for themselves." He claims, however, that his remark was not intended to convey the message that NDC advertised in newspapers for workers, and that he responded as he did because he didn't like what he saw when he walked in, how Della Vella and the others were treating the receptionist. He contends that the four were being very arrogant towards her, and that is why he responded to them in what he described as a "stand-offish" and "smart-aleck" manner. (Tr. 544-545).

Stevenson's explanation for his comment made very little sense and is found not to be credible. First, I see no nexus between Stevenson's claim that Della Vella was being arrogant with the receptionist, and his statement to Della Vella and the others that they should consider looking in the newspaper for work. From a common sense point of view, I find it highly unlikely that Stevenson would have responded in such a way if he indeed was attempting to shield his receptionist from Della Vella's alleged arrogance. Rather, I find it more likely than not that Stevenson, as testified to by Della Vella, Castaldi, and McKay, was merely reaffirming what the receptionist told them about NDC doing its hiring through newspaper ads and that Della Vella and the others should watch the ads to see when NDC was hiring. Accordingly, I credit Della Vella, Castaldi, and McKay and find that when they visited NDC's office in March to apply for work, they were told by the receptionist Denise and by Stevenson that it was not accepting applications and that NDC did its hiring by placing ads in local newspapers.

B. Discussion

1. The Section 8(a)(1) allegation

The General Counsel contends, and I agree, that Respondent violated Section 8(a)(1) when, on April 9, Moore asked Thwaites for referrals but told him that the applicants could not be affiliated with the Union.²³ Moore's remark clearly conveyed the message that the Respondent would not hire individuals solely because of their Union affiliation, and could

²¹ Stevenson did not explain what "thing" he had given to Angelucci an hour earlier. Presumably, Stevenson was referring to the written warnings and oral notice of suspension he gave Angelucci when the latter first reported for work that morning.

²² The receptionist was identified by Stevenson as "Denise." (Tr. 545).

²³ The Respondent on brief offers no defense to this allegation.

reasonably have coerced Thwaites, a covert salt, into refraining from further engaging in organizational or other protected concerted activity. See, e.g., *Pan American Electric*, 328 NLRB 54 (1999); *Quality Control Electric*, 323 NLRB 238 (1997); *GM Electrics*, 323 NLRB 125, 126 (1997).

2. The Section 8(a)(3) allegations

a. The alleged refusal to hire or to consider for hire Union applicants

The General Counsel contends, and the Respondent denies, that NDC unlawfully refused to hire or to consider for hire applicants Corazo, Della Vella, Poston, and Pritchard because of their membership in, or affiliation with, the Union. In *FES*, 331 NLRB 9 (2000), the Board set forth the framework for analysis of both refusal-to-hire and refusal-to-consider for hire allegations. In refusal-to-hire situations, the General Counsel must show that (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. *FES*, supra, slip op at 6. In a refusal-to-consider-for-hire case, the General Counsel's burden is one of showing (1) that the respondent excluded applicants from a hiring process, and (2) that antiunion animus contributed to the decision not to consider the applicant for employment. *FES*, slip op. at 8. If the General Counsel meets her initial burden for the refusal-to-consider and/or refusal-to-hire allegations, respectively, the burden shifts to the respondent to show that it would not have considered or hired the applicants even in the absence of their union activity or affiliation. *Wright line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U. S. 989 (1982).

Regarding the refusal-to-hire allegation, the Respondent admits that alleged discriminatees Della Vella, Corazo, Poston, and Pritchard all were fully qualified for the entry-level positions advertised in its March ad.²⁴ It contends, however, that when the four applied for work on March 11, it had already made a decision not to hire any additional technicians because the various projects it had expected to begin working on in late March and early April were either delayed or cancelled by FirstUSA. It claims that as a result of these unexpected delays, its immediate need to hire additional workers disappeared, leading to its decision not to continue with its hiring plans. It consequently argues that because it "did not hire anyone in response to the March 1, ad, the General Counsel cannot establish that NDC was hiring or had concrete plans to hire in or around the time the salts submitted applications," requiring dismissal of the refusal-to-hire allegation. (RB:17-18). I disagree.

While it does appear that the Respondent did not hire any of the applicants who responded to the March ad, the weight of the evidence, more particularly, Maston's March 11, conduct in

calling more than half of the applicants who responded to the March ad to ascertain their interest in working for Respondent and to discuss their salary and work requirements, in thereafter scheduling three applicants for interviews for March 17, and in offering employment to applicant Taraschi following his interview, establishes rather convincingly that on March 11, when the four alleged discriminatees applied for work, the Respondent did indeed have concrete plans to hire, and was about to commence the interview and hiring process. Thus, Maston's actions are inconsistent with Respondent's claim that as of March 11, it was no longer in a hiring mode.

There are yet other factors which undermine Respondent's claim that it was no longer hiring as of March 11. Thus, if, as claimed by NDC, it was no longer hiring on March 11, that message was never conveyed by Maston to Della Vella or Corazo when they handed him their (as well as Poston's and Pritchard's) job applications. Instead, Maston, as indicated, simply told them he would take of their applications. Nor was any such message conveyed by Barbo to Della Vella when the latter called to inquire on the status of his application. Rather, Barbo, as credibly testified to by Della Vella, simply told him, "we're looking into it; we'll get back to you; we'll let you know," creating the distinct impression that the Respondent was still considering applicants for hire. Moore's April 9, request to Thwaites for referrals also establishes that the Respondent was still looking for workers, but of a nonunion persuasion. Finally, Respondent's hiring on April 13, of employee Feyhl, and its continued hiring throughout the month of April and the months that followed, makes patently clear that while it may not have hired any of the applicants who responded to its March ad, the Respondent nevertheless remained in need of, and indeed continued looking for, additional workers to supplement its workforce. In light of these facts, I find that the General Counsel has demonstrated that the Respondent did indeed have definite plans to hire when the four alleged discriminatees submitted applications on March 11.

Finally, there is ample evidence to support a finding that Respondent's antiunion animus was the controlling factor in Respondent's decision not to hire any of the four named discriminatees. Thus, Moore's April 9, unlawful remark to Thwaites that Respondent would not hire applicants who were affiliated with the Union, and the unlawful conduct and statements admitted to in the joint stipulations, provide ample evidence of Respondent's animosity and hostility towards the Union and its supporters. Such evidence includes Respondent's admission in Jt Exh. 2 that discriminatee Poston had been terminated once before for his union activities;²⁵ that it threatened to close its facility and lay off employees if Juliano and other employees chose to be represented by the Union; that it threatened Juliano and other Union organizers with physical harm; and to set up and get rid of Juliano because of his union activities.²⁶ That

²⁵ Poston's prior discharge and other related allegations were resolved by settlement agreement entered into by the parties and received into evidence as Jt. Exh. 1C.

²⁶ While the above stipulated statements and conduct were not specifically alleged in the instant complaint as separate violations, it is well settled that conduct that exhibits animus but that is not independently alleged or found to violate the Act may nevertheless be used to shed

²⁴ See, RB:12; Jt Exh. 4A.

Respondent failed to hire any of the applicants who responded to the March ad does not undermine the General Counsel's prima facie case, for I am convinced, given its subsequent conduct and actions, that the Respondent deliberately chose not to hire from that pool of applicants as a way of justifying not hiring to hire any of the four alleged discriminatees. In short, I find that the General Counsel has made a strong prima facie showing under *FES*, supra, that Della Vella, Corazo, Poston, and Pritchard were denied employment solely because of their affiliation with the Union.

The Respondent, for its part, offers nothing more than shifting and unsupportable defenses to the refusal-to-hire allegation. For example, the Respondent, as alluded to above, claims it did not hire the four alleged discriminatees, or for that matter anyone who responded to the March ad, because delays and/or cancellations in the First USA projects it expected to begin working on in late March and early April eliminated its immediate need to hire additional workers. It claims that the fact that no one who responded to the March ad was hired supports its position that it indeed was not in a hiring mode. Its argument in this regard is flawed in several respects.

First, its claim that the four alleged discriminatees were not hired because its hiring needs had dissipated by the time they applied for work was not cited by Maston in his signed declaration to the Board as a reason for their nonhire. Rather, in response to the refusal-to-hire allegation, Maston, in his statement to the Board, explained that the four alleged discriminatees had failed to apply in the manner required by the March ad, e.g., through resumes, and that, by the time they turned in their resumes, he had begun to interview other applicants whose resumes were received before their own. Nowhere in his statement does Maston state that the alleged discriminatees were not hired because the Respondent had changed its mind about hiring. Rather, Maston's explanation suggests that it was the alleged discriminatees' failure to properly apply for employment, and not, as claimed by Respondent at the hearing and on brief, a decision by NDC to cancel or postpone its hiring plans because of alleged project delays, which purportedly led to their not being hired or considered for hire.²⁷ This apparent shift in Respondent's explanation for not hiring or considering for hire the four alleged discriminatees, from that first proffered by Maston in his statement to the Board to that raised by Respondent at the hearing and on brief, supports an inference that neither explanation is a truthful one and that the real reason is

light on the motive for other conduct that is alleged to be unlawful. *Kanawha Stone Co. Inc.*, 334 NLRB 235 at fn. 2 (2001).

²⁷ Maston's assertion in his statement to the Board, that the alleged discriminatees had initially failed to properly apply for work by submitting job applications rather than resumes, is inconsistent with assurances given by Barbo to Della Vella and Corazo when they applied for work that they were free to submit job applications in lieu of resumes. I am convinced that the explanation proffered by Maston in his statement to the Board was a pretextual one. The Respondent, as noted, appears to have abandoned Maston's explanation as a reason for not hiring the four alleged discriminatees as it was not raised as a defense at the hearing and, in fact, appears to have been repudiated by Maston himself.

one which the Respondent seeks to conceal.²⁸ *Doug Wilson Enterprises, Inc.*, 334 NLRB 394 (2001); *Lucky Service Co.*, 292 NLRB 1159, 1167 (1989).

Further, as previously discussed, the Respondent's claim that it had postponed any hiring plans because of delays in its projects is patently false, for Moore's April 9, request to Thwaites for referrals, and the fact that the Respondent on April 13, began hiring, and continued doing so throughout April and in the months that followed, provides clear evidence that no such decision had been made. Admittedly, the Respondent did not hire from the pool of applicants who responded to the March ad. However, the above facts showing that the Respondent intended to, and did indeed, hire workers, albeit from sources other than the March ad, convinces me that Maston's decision not to hire any of the March ad applicants must have been motivated by some factor other than a decision not to hire. Clearly, Maston's March 11, decision to schedule several of the March ad applicants for interviews, and his offer of employment to Taraschi, suggests that the Respondent had intended to hire from the pool of March applicants, but subsequently changed its mind. Having rejected as not credible Respondent's explanation that it simply no longer had an immediate need to hire, I find, in the absence of any other explanation, that the Respondent's decision not to hire from the March pool of applicants was more likely than not prompted by its receipt of applications from four union supporters. As indicated, the Respondent strongly opposed the Union and its supporters and, as evident by Moore's April 9, comment to Thwaites, had no desire or intention of hiring them. In an attempt to avoid hiring or giving hiring consideration to Union job applicants Della Vella, Corazo, Poston, and Pritchard, the Respondent, as previously indicated, opted not to hire any of the applicants who responded to the March ad²⁹ under the guise that delays in the starting dates of its various projects had eliminated its need to hire additional workers.

The Respondent also claims that its refusal-to-hire the four alleged discriminatees was justified because they were overqualified for the position. This "overqualification" defense, however, was raised for the first time at the hearing and never cited by Maston in his statement to the Board as a reason for why Della Vella, Corazo, Poston, or Pritchard were not hired. As previously indicated, this shifting defense supports an inference of unlawful motivation. However, it is patently obvious that this overqualification factor could not have played a role in their nonhire for Maston, who was responsible for the hiring, readily admitted that he never so much as looked at the dis-

²⁸ The Respondent, it should be noted, admits on brief that "its defenses did shift to an extent" (RB:19, fn. 21). Its claim that it did so because Maston needed to recant his statement to the Board "in order to relate the true facts" is rejected as without merit.

²⁹ The fact that on March 11, Maston scheduled three of the March applicants for interviews, and on March 17, interviewed and offered employment to applicant Taraschi, makes clear that the Respondent had every intention of hiring from the pool of applicants who responded to its March ad.

criminatees' job applications. In sum, Respondent's overqualification defense is rejected as without merit.³⁰

Finally, the Respondent's claim that it did not unlawfully refuse to hire paid Union organizers Della Vella or Corazo because they were not bona fide job applicants is rejected as without merit. In *Town & Country Electric*, 516 U.S. 85 (1995), the Supreme Court upheld the Board's position in *Sunland Construction Co.*, 309 NLRB 1224 (1992), that paid union organizers applying for jobs, as is the case here with Della Vella and Corazo, are statutory employees entitled to the protection of the Act. Both Della Vella and Corazo, as previously discussed, submitted applications as required by Respondent, and testified credibly and without contradiction, that if hired, they would have worked for Respondent. Both, as further noted, made repeated followup calls to Respondent to inquire about the status of their applications, a clear indication that they had a genuine and continued interest in obtaining employment with and working for Respondent. The Respondent's contention that they should not be considered bona fide applicants because of the high salaries they earn as Union organizers, because they engaged in what the Respondent perceives to have been harmful picketing and handbilling at some of its sites, and because they would only have worked for brief periods of time is rejected. Recently, in *Aztech Electric Company; Contractors Labor Pool, Inc.*, 335 NLRB 260 (2001), the Board rejected similar arguments raised by the employer therein by noting that in *Town & Country*, the Court had "expressly rejected the argument that statutory status should be denied to paid union organizers because "salts" might try to harm the company, perhaps quitting when the company needs them, perhaps disparaging the company to others, perhaps even sabotaging the firm or its products"

In sum, I find that the Respondent has not sustained its burden of showing that alleged discriminatees Della Vella, Corazo, Poston, and Pritchard would not have been hired absent their affiliation with the Union. Accordingly, the Respondent's refusal to hire Della Vella, Corazo, Poston, and Pritchard is found to have violated Section 8(a)(3) and (1) of the Act.³¹

b. Suspension, warning, and discharge of Angelucci

The complaint alleges that the actions taken against Angelucci, including his April 28, suspension, his early dismissal from work on May 4, the warnings issued to him on May 5, and his eventual discharge on May 6, were all motivated by anti-union considerations and thus unlawful. Applying a *Wright Line* analysis, I find that the General Counsel has made a prima facie showing that the disciplinary measures taken against Angelucci, including his discharge were prompted by his Union activities. Angelucci's involvement with the Union is well-established in the record, as is Respondent's knowledge of such activities. As previously noted, the Respondent admits learning

of Angelucci's ties to the Union and of his involvement in Union activities eight days before it suspended him on April 28, for distributing union literature. Evidence of Respondent's animus is, as found above in connection with the refusal-to-hire allegation, well-established in the record. Accordingly, I am satisfied that the General Counsel has established, prima facie, that the Respondent was hostile to the Union and its supporters, and that Respondent's April 28, suspension of Angelucci, his early dismissal on May 4, the warnings issued to him for arriving late for work and leaving early on May 5, and his eventual discharge on May 6, were retaliatory in nature and motivated by said animosity. As the General Counsel has met her initial *Wright Line* burden of proof, the burden now rests with the Respondent to show that it would have taken the same actions against Angelucci even if he had not been a union supporter or activist. The Respondent, I find, has failed to meet its burden.

Thus, as to Angelucci's April 28, suspension, the Respondent has presented no credible evidence to support Stevenson's claim that Angelucci's handbilling activities occurred during his work time and in a work area. Thus, there was no independent corroboration for Stevenson's assertion that Angelucci had distributed union literature during his lunch break. Stevenson, as noted, did not witness Angelucci's activities firsthand, and the only individual who allegedly witnessed his activities that day, e.g., the Liberty property manager, was not called to testify. Angelucci, as further noted, denied, credibly so in my view, that his activities took place during his work time. It is well settled that an employer may not prohibit its employees from engaging in solicitation relating to union or other protected activities during nonworking times or in distribution of literature relating thereto in nonworking areas of its premises during nonworking time, absent a showing by the employer that such a prohibition is necessary to maintain plant discipline or production. *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483 (1978); *Gayfers Department Store*, 324 NLRB 1246, 1248 (1997). The Respondent here has presented no evidence to show that Angelucci's April 28, lunchtime handbilling activity in nonwork areas in any way interfered with, or adversely affected, its ability to perform its cabling installation work at the Signal jobsite, or that it had caused disciplinary problems among employees. Accordingly, I find that by suspending Angelucci for handbilling on April 28, the Respondent violated Section 8(a)(3) and (1) of the Act.

Regarding Angelucci's early dismissal from work on May 4, the latter, as noted, testified that Bower sent him home around noontime after seeing Angelucci distributing union literature to a security guard during Angelucci's lunchbreak. Angelucci's testimony, including his claim that just prior to sending him home Bower asked Angelucci why he kept doing this (e.g., distributing union literature) to him, is uncontested and found to be credible. The Respondent offered no explanation for sending Angelucci home early on May 4, and Angelucci's credited testimony makes clear that there remained work to be done at the jobsite and that, while he was dismissed early, other employees were kept on the job. In these circumstances, it is reasonable to infer, particularly in light of Bower's failure to testify, that Bower sent Angelucci home early on May 4, in retaliation for his handbilling activities. Having failed to offer

³⁰ Poston, as previously indicated, had worked for Respondent before being unlawfully terminated, making it highly unlikely that he would have been considered overqualified for the position.

³¹ Having found that the Respondent unlawfully refused to hire Della Vella, Corazo, Poston, and Pritchard, I need not address the refusal-to-consider for hire allegation in the complaint. *Interstate Builders, Inc.*, 334 NLRB 835 at fn. 2 (2001).

any explanation for sending Angelucci home early, I find that the Respondent has not rebutted the General Counsel's prima facie case. Accordingly, I find that the Angelucci's May 4, early dismissal violated Section 8(a)(3) and (1) of the Act.

As to the May 5, warnings, Angelucci, as noted, received two warnings, the first for arriving one hour late to work, the second for leaving work early that same day. Regarding the "late arrival" warning, the only defense offered by Respondent is Stevenson's testimony that he chose not to believe Angelucci's explanation that a traffic accident caused him to be late because other employees who lived in the same area as Angelucci (and presumably traveled the same route to work) had arrived to work on time that morning. However, Stevenson's claim that Angelucci was the only employee to arrive late for work that morning was not substantiated by documentary or other evidence. The Respondent, I am convinced, could have corroborated Stevenson's claim in this regard by producing the weekly timesheets of other employees showing when they arrived to work on May 5.³² The Respondent chose not to do so, warranting an adverse inference that said records would not have supported Stevenson's claim that Angelucci was the only late arrival that day. I credit instead Angelucci's testimony that other employees were also late that day. In this regard, I note that Angelucci's explanation about being delayed due to a traffic accident was corroborated by a newspaper article, received into evidence without objection as GCX-24, showing that a traffic accident had in fact occurred on the morning of May 5. In sum, I find that Stevenson simply seized upon Angelucci's admitted late arrival on May 5, as a pretext to retaliate against him for his Union activities. "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. 705 F.2d 799 (6th Cir. 1982). Having found Respondent's explanation for the warning to be pretextual, it follows that the Respondent has not sustained its *Wright Line* burden of showing that Angelucci would have received the warning even if he had not engaged in union activities or been a Union supporter. Accordingly, I find that Angelucci's May 5, "late arrival" warning was unlawful and violated Section 8(a)(3) and (1) of the Act.

The warning issued to Angelucci for leaving work early on May 5, is also found to be pretextual and unlawful. Thus, I credit Angelucci and find that after arriving late for work on May 5, Stevenson told him he could either remain at the facility and help out another employee in the warehouse or go home for the rest of the day. Stevenson's claim that Angelucci was given no such option is simply not believable, particularly since Stevenson himself initially was unable to recall whether or not he had done so. Having found that Angelucci was given the option of either remaining at Respondent's facility or going home following his late arrival for work on May 5, it follows that

³² Angelucci's weekly timesheets for the period February 2, through May 1, received into evidence as R. Exh. 9, reflect that the Respondent keeps a record of the time an employee arrives and leaves work each day.

Stevenson was not justified in issuing him a warning or suspending him indefinitely the following day because Angelucci opted to go home rather than remain at the facility.³³ for opting to go home. Having rejected as without merit Respondent's explanation for issuing Angelucci the "early departure" warning, it follows that the Respondent has not provided a legitimate, nondiscriminatory for its issuance, and has consequently failed to rebut the General Counsel's prima facie case. Accordingly, I find that the warning issued to Angelucci on May 5, for leaving work early, like the unlawful warning issued to him for arriving late for work and like the suspension issued to him for distributing union literature during his free time, was part and parcel of Respondent's efforts to retaliate against Angelucci for his union activities. As such, its issuance violated Section 8(a)(3) and (1) of the Act, as alleged.

Finally, Angelucci's May 6, discharge was also unlawful. As the Board recently pointed out in *The Hays Corp.*, 334 NLRB 48, 50 (2001), "where a respondent disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful." Here, Angelucci's discharge was, as noted, based in large part on his April 28, suspension, and on the two warnings issued to him on May 5, all of which were found to have been unlawfully imposed on, or issued to, Angelucci for his union activities. Although the Respondent also cites Angelucci's insubordination as a grounds for the discharge, it has not demonstrated what, if any, discipline would have been meted out to Angelucci for the alleged insubordination had it not relied on the unlawful suspension and warnings. See, *Celotex Corp.*, 259 NLRB 1186, fn. 2 (1982).³⁴ As the Respondent has not shown that it had a legitimate, nondiscriminatory reason for discharging Angelucci on May 6, the

³³ The Respondent contends on brief that it is "a rare manager" who would allow "an employee to decide whether to work or quit." Its argument, in essence, is that it is somehow illogical to believe that Stevenson would have permitted Angelucci to make the decision of whether or not he wanted to work. While the record does not explain just why Angelucci was given that option on May 5, Angelucci did testify, without contradiction and in my view credibly, that he had in the past often been asked if "I wanted to just go home for the day or . . . work in the warehouse." (Tr. 306) Stevenson's own testimony, that by the time Angelucci arrived for work on May 5, all other employees had been dispatched to their jobsites, suggests the likelihood that the Respondent may have had little use for Angelucci's services that day, prompting Stevenson to offer Angelucci the option of remaining at the facility or going home.

³⁴ I am, in any event, not convinced, given the inconsistency between Moore's and Stevenson's testimony, that insubordination played any role in Angelucci's discharge. Thus, while Stevenson, as noted, claims he made the decision to discharge Angelucci for "insubordination and various other things" after receiving a report from Moore that Angelucci was still on the premises, Moore's testimony reflects that he delivered the discharge letter to Angelucci before the latter expressed his refusal to leave. Thus, if accepted as true, Moore's testimony clearly indicates that Angelucci's alleged insubordinate behavior occurred after he was notified of the discharge, and thereby contradicts Stevenson's claim that the discharge letter was prepared and the discharge effectuated after Angelucci purportedly became insubordinate by refusing to leave the premises until the police were called.

discharge is found to have violated Section 8(a)(3) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent, Network Dynamics Cabling, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local Union 98, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling an employee that applicants for employment could not be affiliated with the Union, the Respondent has violated Section 8(a)(1) of the Act.

4. By refusing to hire job applicants William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard because of their membership in the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. By suspending Anthony Angelucci on April 28, sending him home early from work on May 4, issuing him warnings on May 5, and discharging him on May 6, because of his membership in and activities on behalf of the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. The above-described unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy the unlawful refusal-to-hire violation, the Respondent shall be required to, within 14 days from the date of the Order, offer William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard reinstatement in positions for which they applied, or if such positions no longer exist, to substantially equivalent positions, without prejudice to seniority or any other rights and privileges they would have enjoyed absent the discrimination against them. The Respondent shall also be required to make them for any loss of earnings and other benefits they may have suffered as a result of its unlawful refusal to hire them, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173.

To remedy the violations committed against Anthony Angelucci, the Respondent shall likewise be required to, within 14 days from the date of the Order, rescind the May 5, warnings issued to him, and to offer Angelucci full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. Further, the Respondent shall make Angelucci whole for any losses he may have suffered as a result of his unlawful April 28, suspension, his early dismissal from work on May 4, and his discharge on May 6, in the manner prescribed in *F.W. Woolworth Co.*, supra,

with interest to be computed as prescribed in *New Horizons for the Retarded*, supra.³⁵

The Respondent will also be required to, within 14 days from the date of the Order, remove from its files any reference to its unlawful refusal to hire William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard, and any reference to Anthony Angelucci's unlawful April 28, suspension, its unlawful early dismissal of Angelucci from work on May 4, the unlawful warnings issued to Angelucci on May 5, and to Angelucci's unlawful discharge on May 6, and within 3 days thereafter, notify the above employees in writing that this has been done and that said conduct will not be used against them in any way. Finally, the Respondent will be required to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁶

ORDER

The Respondent, Network Dynamics Cabling, Inc., Westchester, PA, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it would not hire job applicants who are affiliated with the Union.

(b) Refusing to hire job applicants because they are members of or sympathizers with the Union.

(c) Suspending employee Anthony Angelucci from work, sending him home early, issuing him written warnings, and discharging him for supporting or engaging in activities on behalf of the Union.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard employment to positions for which they applied, or if such positions no longer exist, to substantially equivalent positions, without prejudice to seniority or any other rights and privileges they would have enjoyed absent the discrimination against them.

(b) Make whole William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard for any loss of earnings and other benefits sustained due to Respondent's unlawful refusal to hire them, as set forth in the remedy section of this decision.

³⁵ The General Counsel amended the complaint at the hearing to include, as part of any remedial relief to be granted to the discriminatees, a requirement that the Respondent reimburse Della Vella, Corazo, Poston, Pritchard, and Angelucci for any extra federal and/or state taxes that would or may result from a lump sum payment of backpay to them. I decline to grant such relief as this would involve a change in Board law and is, therefore, best left to the Board for its consideration following a full briefing by the affected parties. See, *Cannon Valley Woodwork, Inc.*, 333 NLRB No. 97, at fn. 3 (2001).

³⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days of the date of the Order, offer Anthony Angelucci full reinstatement to his former position or, if the position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Anthony Angelucci whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension on April 28, his early dismissal from work on May 4, and his unlawful discharge on May 6, in the manner described in the remedy section of this decision.

(e) Within 14 days from the date of the Order, remove from its files any reference to its unlawful refusal to hire William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard, and any reference to Anthony Angelucci's unlawful April 28, suspension, its unlawful early dismissal of Angelucci from work on May 4, the unlawful warnings issued to Angelucci on May 5, and to Angelucci's unlawful discharge on May 6, and within 3 days thereafter, notify the above employees in writing that this has been done and that said unlawful conduct will not be used against them in any way.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Westchester, PA, copies of the attached notice marked "Appendix."³⁷ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 1998.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 17, 2001

NETWORK DYNAMICS CABLING, INC.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT tell our employees that job applicants for employment having an affiliation with the Union, International Brotherhood of Electrical Workers, Local Union 98, AFL-CIO, or any other labor organization, will not be hired.

WE WILL NOT refuse to hire applicants for employment because they are members of or are affiliated with a Union.

WE WILL NOT suspend employees, send employees home early from work, issue employees disciplinary warnings, or discharge employees because of their membership in or activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days of the date of the Board's Order, offer employment to William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard to positions for which they applied, or if such positions no longer exist, to substantially equivalent positions, without prejudice to seniority or any other rights and privileges they would have enjoyed absent the discrimination against them.

WE WILL make whole William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard for any loss of earnings and other benefits they may have suffered as a result of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days of the date of the Board's Order, offer Anthony Angelucci full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Angelucci whole for any loss of earnings and other benefits he may have suffered resulting from his unlawful suspension, his early dismissal from work, and his unlawful discharge, with interest.

WE WILL, within 14 days from the date of the Order, remove from our files all reference to our unlawful refusal to hire William Corazo, Raymond Della Vella, Robert Poston, and John

³⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Pritchard, and all reference to Anthony Angelucci's unlawful suspension, to his unlawful early dismissal, to the unlawful warnings issued to him, and to his unlawful discharge, and WE WILL within 3 days thereafter, notify the above employees in

writing that this has been done and that said unlawful conduct will not be used against them in any way.